Defamation and libel laws in Europe – the framework of Article 10 of the European Convention on Human Rights (ECHR)

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Introduction

This article will consider the scope and effect of the guarantee of the right of freedom of expression and information provided by Article 10 of the European Convention on Human Rights (ECHR), particularly with regard to the legitimacy of restrictions and limitations based on defamation and libel laws to protect the reputation and rights of others. For this, the relevant case-law of the European Court of Human Rights will be analysed. Firstly, the general perspective and the main features of the protection of Article 10 ECHR will be briefly introduced.

1. Article 10 ECHR as a binding legal instrument in Europe

The European Convention on Human Rights is the central treaty-instrument within the European Council's framework (Merrils, 1988; Cohen Jonathan, 1989). With regard to European media regulation in general, specific attention should be paid to Article 10 of the Convention that guarantees freedom of expression and information, which is seen as one of the essential principles of a democratic society and one of the basic conditions for its progress and for the development of every man and woman. Article 10 ECHR forms the basis for the freedom of expression and information and for media law within the Council of Europe and its present 27 member states.

Moreover, Article 10 ECHR also has implications on EC-law. In some recent judgments the Court of Justice confirmed earlier jurisprudence that recognises the effect of the ECHR and of Article 10 ECHR in particular within the legal order of the European Community (Nold, 1974; Stichting Goudse Kabel, 1991 and *Commission v The Netherlands*, 1991; *Elliniki Radiophonia Tileorassi* 1991). More generally, in the new Treaty on European Union, Article F of title I of the common provisions provides that 'the Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms' (Treaty on European Union, 1992). Furthermore, in the preamble of the EC-Directive of 3 October 1989 on 'TV without frontiers' the freedom of expression of Article 10 ECHR as ratified by all EC-member states, is explicitly mentioned as a specific expression of a more general standard in Community Law (Council of European Communities, 1989; Voorhoof, 1990).

So, Article 10 ECHR offers the fundamental framework for media law and for the legislation and practice on restrictions on the freedom of expression and information in Europe, both within the scope of the Council of Europe and within the European Union of the European Community.

2. The protection of freedom of communication and Article 10 ECHR

2.1. Article 10 of the Convention provides the following :

'1. Everyone has the right to freedom of expression. This right shall include to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

2.2. Article 10 guarantees the freedom of expression and information, i.e. the right to freedom of expression and the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. Article 10 ECHR explicitly does not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

Conditions and restrictions on the freedom of expression and information (we also use the term 'freedom of communication' – see Voorhoof, 1987) are only legitimate in so far as they are compatible with the criteria set forth in para 2 of Article 10. The second paragraph of Article 10 contains the limitative enumerated and restrictive exceptions of legitimation to restrain freedom of communication. With regard to the evaluation of these restrictions, according to the European case-law 'the Court is faced not with a choice between two conflicting principles but with a principle of freedom of expression that is subject to a number of exceptions which must be narrowly interpreted' (*Sunday Times*, 1979). The necessity restricting this fundamental right of freedom of expression and information must be 'convincingly established' (*Autronic*, 1990; *Observer/Guardian*, 1991; *Thorgeirson*, 1992).

It should be noted also, that the freedom of expression and information can be linked with other rights and freedoms guaranteed by the ECHR. A conviction for defamation or libel in the context of a public demonstration has to be in accordance with the freedom of assembly protected by Article 11 of the Convention. In such circumstances, Article 11 is considered as the 'lex specialis' with regard to Article 10 as the 'lex generalis' (*Plattform Ärzte Für Das Leben*, 1988; Ezelin, 1991).

2.3. Furthermore, according to Article 10 para 2 there are three conditions that must cumulatively be fulfilled. If one of these conditions is neglected, the restricting rule with regard to the freedom of communication must be regarded as an infringement of Article 10 ECHR (see also Korff, 1988).

Firstly, restrictions must be 'prescribed by law', which means in the European Court's case-law that any restricting rule must meet the criteria of precision and accessibility (*Sunday Times*, 1979). This means the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. It means also that any restricting norm must be formulated with sufficient precision so that the citizen is able, if need be with appropriate advice, to foresee the consequences which a given action may entail to a degree that is reasonable in the circumstances. Of course, the European Court is aware of the fact that laws are framed in a manner that is not absolutely precise and that the interpretation and application of the constantly changing legislation in the field of the massmedia are inevitably questions of practice. Insofar as there is a clear and consistent case-law on the matter, this case-law is seen as enabling journalists, publishers, media companies, commercial operators and their advisers to regulate their conduct in the relevant sphere (*Markt Intern*, 1989; *Groppera Radio*, 1990; *Sunday Times*, 1991). If the legal basis, however shows a lack with respect to the required clarity and precision because no criteria are indicated for the application of the law, this restriction will not deserve the status of 'law' within the meaning of article 10 ECHR (*Autronic*, 1990).

Secondly, any restriction must pursue a legitimate aim as foreseen in para 2 of Article 10. These legitimate grounds for restricting freedom of communication can be situated in several groups of interests:

- (1) the interests of national security, territorial integrity, public safety (interests of the state);
- (2) the maintaining of the authority and impartiality of the judiciary (interests of the jurisdiction);
- (3) the prevention of the disclosure of information received in confidence (interests of the administration of public authorities and the administration of justice; interests of secrecy and privacy);
- (4) the prevention of disorder or crime (general interests of society);
- (5) the protection of health or morals (interests of the population in general);
- (6) the protection of the reputation or rights of others (private interests, rights of individuals, privacy, the protection against defamation and libel).

Thirdly, the 'necessity test in a democratic society' is the most decisive and ultimate criterion: any restriction on the freedom of communication imposed by a public authority, must be proven to be really necessary in a democratic society. The Court has noted that, whilst the adjective 'necessary' within the meaning of Article 10 para 2, is not synonymous with 'indispensable', neither has it the flexibility of such expressions as 'admissible', 'ordinary', 'useful', 'reasonable' or 'desirable'. There must be a 'pressing social need' for any restriction on this freedom of communication. The Commission and finally the Court are supervising the application of Article 10, by examining this criterion sharply and by evaluating the pertinent and proportionate character of the restrictions in question. This means that every formality, condition, restriction or penalty with regard to the freedom of communication, must be proportionate to the legitimate aim pursued. The Court is empowered to give a final ruling on whether a restriction or penalty is in accordance with the freedom of expression and information with due regard to the importance of this freedom in a democratic society.

2.4. In its case-law the Court has consistently held that the contracting states have a certain margin of appreciation in assessing the existence and extent of the necessity of an interference, but this margin is subject to a European supervision as regards both the legislation and the decisions applying it. The extent of the European supervision can vary according to the case and the legitimate aim involved. The scope of domestic power of appreciation is, in other words, not identical for each of the aims listed in Article 10 para 2. So there is e.g. a lower degree of supervision with regard to the interpretation of 'morals': the national authorities are considered to be, in principle, in a better position than the international judge to give an opinion on the exact content of these requirements, which vary strongly from state to state. There is no uniform European conception of 'morals' (*Handyside*, 1976; *Müller*, 1988).

When carrying out its supervision, the Court must ascertain whether the measures taken at the national level are justifiable in principle, and proportionate (*Groppera Radio*, 1990). In the 1991 *Sunday Times* case the Court clearly defined its task as follows: 'The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of

appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'. (*Sunday Times*, 1991).

Other recent cases (*Barford*, 1989; *Markt Intern*, 1989) have shown that in fact an internal discussion is going on within the European Court of Human Rights about the extent the Court is carrying out a 'European supervision'. In the *Markt Intern* case the Court, by a 9 to 9 voting, was of the opinion that the European Court of Human Rights should not substitute its own evaluation for that of the national courts, where those courts, on reasonable grounds, had considered the restrictions to be necessary (Markt Intern, 1989).

So, in some judgments on Article 10 ECHR, this margin of national appreciation is given a relative autonomy, which is both a recognition of the national diversities in the context of the European legal order as a reduction of the importance of the European supervision over the implementation in national law and practice of the freedom of communication. In some of the jurisprudence of the European Court of Human Rights about Article 10 ECHR, the national authorities are compelled to provide a higher level of protection of freedom of information and freedom of public speech (see e.g. *Sunday Times*, 1979; *Barthold*, 1985; *Lingens*, 1986; *Oberschlick*, 1991; *Sunday Times*, 1991; *Castells*, 1992; *Thorgeirson*, 1992). In other jurisprudence a higher level of autonomy seems to be given to the member states in order to keep up restrictions on the freedom of information and expression, especially where it concerns restrictions or sanctions with regard to pornography or obscenity (*Handyside*, 1976; *Müller*, 1986) or commercial speech (*Markt Intern*, 1989).

2.5. The last sentence of para 1 of Article 10 allows the States to control the way in which broadcasting is organised in their territories, by means of a licensing system. It does not however provide that licensing measures shall not otherwise be subject to the requirements of para 10, for that would lead to a result contrary to the object and purpose of Article 10 as a whole. The *Groppera Radio* judgment has made explicit that the object and purpose of the last sentence of Article 10 para 1 and the scope of its application must be considered in the context of Article 10 as a whole and in particular in relation to the requirements of para 2 (*Groppera Radio*, 1990). This means that also the restrictions on the content of radio and television programmes must be in accordance with the second paragraph of Article 10 ECHR.

2.6. Article 10 ECHR gives protection both to ideas and to all kinds of information. Not only opinions, philosophical ideas or political speeches are protected by Article 10, but also facts and news or even factual data or radio and television programme data (*Geillustreerde Pers*, 1976). The European Court's case-law also gives support to the freedom of artistic expression, which, in the Court's view, 'affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds' (Müller, 1988). The Court is of the opinion that those who create, interpret, distribute or exhibit works of art, contribute to the exchange of ideas and opinions which is essential for a democratic society. Hence the obligation for the State not to encroach unduly on their freedom of expression. It should be noticed however that the European Court does not recognise an 'exceptio artis'. Artists are certainly not immune from the possibility of limitations as provided for in para 2 of Article 10.

It has to be mentioned that Article 10 ECHR also gives protection to commercial information. While there was still some discussion about this viewpoint before and even after the *Barthold* judgment, in the *Markt Intern* case the Court stated clearly that the contested article conveyed 'information of a commercial nature' and that 'such information cannot be excluded from the scope of Article 10 para 1 which does not apply solely to certain types of information or ideas or forms of expressions' (*Markt Intern*, 1989, see also Voorhoof, 1991). Yet, it has to be noted that the protection of commercial information and commercial advertising is to be situated on a lower level than e.g. political speech (*Church of Scientology*, 1979; *Liljenberg*, 1983; *Markt Intern*, 1987; see also De Meij, 1989).

3. Libel and defamation and the freedom of communication according to Article 10 ECHR

The case-law of the European Court of Human Rights indicates some essential criteria as to how to decide whether restrictions or penalties for the protection of the reputation or the rights of others, are 'necessary in a democratic society'. Any restriction or penalty on the freedom of expression or information that is based on defamation or libel law has to be in accordance with the framework of protection of Article 10 ECHR (see also Barendt, 1985; 1991).

3.1. It has to be noted that Article 10 envisages the protection of every kind of expression and information, but the effect of Article 10 ECHR is especially important for the protection of critical and non-conformist speech.

The Court's case-law consistently emphasized that freedom of expression constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man and woman. The freedom of expression and information as guaranteed by Article 10 ECHR is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism,

tolerance and broadmindedness without which there is no 'democratic society'.

This means Article 10 has to be interpreted from a standpoint of a high level of protection of freedom of expression, even if this information is harmful to the state or some groups, enterprises or politicians (*Sunday Times*, 1979; *Barthold*, 1985; *Lingens*, 1986; *Weber*, 1990; *Oberschlick*, 1991; *Castells*, 1992; *Thorgeirson*, 1992).

3.2. Information and ideas are especially given a high level of protection when they are made public in the context of a political debate, i.e. more general the protection of public speech (see also Voorhoof, 1986).

In the *Sunday Times* case the Court drew the attention to the fact that the thalidomide disaster, as the subject matter of the litigious press article, was a matter of 'undisputed public concern' and, by bringing to light certain facts, the article might have served as a brake on speculative and unenlightened discussion. Because of these reasons the Court was of the opinion that the public interest in the freedom of expression on this kind of information was so important that the restraint imposed on the *Sunday Times*' article was to be seen as an infringement to Article 10 ECHR (*Sunday Times*, 1979).

In the *Barthold* judgment the Court noticed that the litigious article was informing the public about a situation occurring in Hamburg at the time when the enactement of new legislation on a particular topic was under consideration. The sanction imposed on a member of a liberal profession was estimated not to be consonant with the freedom of expression as otherwise it risked to discourage members of the liberal professions from contributing to public debate on topics affecting the life of the community (*Barthold*, 1985).

In the *Lingens* and in the *Oberschlick* case it is recognized that for the public the freedom of the press is one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally the Court stated that the freedom of political debate is at the very core of the concept of a democratic society (*Lingens*, 1986; *Oberschlick*, 1991).

In the *Weber* case the Court drew attention to the fact that as a journalist Weber, was well-known for his ecological activism and that his interventions where echoed by the press at large. The secret judicial information the journalist made public on a press conference was linked to this ecological debate and the public was interested in this information. That was the reason why the sanction imposed on the journalist was seen as a breach of Article 10 ECHR (*Weber*, 1990).

In the 1991 'Spycatcher' cases the Court underlined the importance of free speech on matters of public interest (*Sunday Times* 1991, *Observer/Guardian*, 1991). In the *Thorgeirson* case the Court estimated that the litigious articles reporting cases of police brutality, were dealing with a matter of serious public concern. Having regard to the purpose and impact which the articles were designed to have, the Court was of the opinion that the particularly strong and offensive terms could not be regarded as excessive (*Thorgeirson*, 1992). In the *Castells* case too, the Court drew the attention to the fact that the article published by the applicant concerned 'faits d'un grand intérêt pour l'opinion publique' (*Castells*, 1992).

3.3. So the importance for the public to be informed is seen as a crucial factor. In the *Sunday Times* case the Court expressed the viewpoint that the media not only have the task to impart information and ideas on areas of public interest, but that 'the public also has a right to receive them.' In the same judgment the Court observed that Article 10 not only guarantees the freedom to inform the public but also the right of the public to be properly informed (*Sunday Times*, 1979. See also *Sunday Times*, 1991 and *Observer/Guardian*, 1991).

3.4. In this the press plays an important role according to the case-law of the European Court. In the *Sunday Times* case the Court was of the opinion that the general principles of freedom of information are of particular importance as far as the press is concerned: the media have the task of imparting information and ideas in all areas of public interest (*Sunday Times*, 1979). The penalty imposed on a journalist because of the criticism he published and his critical attack on an important politician, reveals the danger of a kind of censure, which would be likely to discourage the journalist from making criticism of that kind in the future. The Court was of the opinion that 'in the context of political debate such a sentence would be likely to deter the journalist from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog' (*Lingens*, 1986, see also *Barthold*, 1985). In the *Barfod* case the Court stated that, when striking a balance between the interests as embodied in the restrictions of Article 10 para 2 against the value of the open discussion of topics of public concern, one cannot overlook the great importance of not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern by means of the mass media (*Barfod*, 1989; see also Voorhoof, 1989a). The importance of the freedom of information for the press is also recognised in the Court judgments of 1991 by emphasizing the vital role of the press as a 'public watchdog' on matters of public interest (*Sunday Times*, 1991; *Observer/Guardian*, 1991; Oberschlick, 1991). In the recent *Castells* case the Court stressed 'le rôle éminent de la presse dans un Etat de droit. Si elle ne doit pas franchir certaines bornes fixeés en vue, notamment, de la défense de l'ordre et de la protection de la réputation d'autrui, il lui incombe néanmoins de communiquer des informations et des idées sur les questions politiques ainsi que sur les autres thémes d'intérêt général. La liberté de la presse fournit aux citoyens l'un des meilleurs moyens de connaître et juger les idées et attitudes de leurs dirigeants. Elle donne en particulier aux hommes

politiques l'occasion de refléter et commenter les soucis de l'opinion publique. Elle permet à chacun de participer au libre jeu du débat politique qui se trouve ou coeur même de la notion de société démocratique' (*Castells*, 1992). In the *Thorgeirson* case the Court took notice of the fact that the applicant expressed his views by having them published in a newspaper and that therefore regard must be had 'to the pre-eminent role of the press in a State governed by the rule of law' (*Thorgeirson*, 1992). In the *Markt Intern* case, the Court also recognised the importance of the specialised press in some sectors. So, the commercial strategy of an enterprise may give rise to criticism on the part of the consumers and the specialised press: in order to carry out its task, the specialised press must be able to disclose facts which could be of interest to its readers and thereby contribute to the openness of business activities (*Markt Intern*, 1989).

3.5. In almost all cases on defamation or libel that came before the European Court of Human Rights, the Court was of the opinion that the national interferences in the applicant's right to freedom of expression were a breach of Article 10 ECHR. Most sanctions or convictions because of defamation or libel were seen as an infringement of Article 10 ECHR.

In the *Lingens* judgment the Court recognised on the one hand that the use of some expressions and value judgments in the litigious article apparently could harm a politician's reputation. In concrete, *Lingens* had been convicted in Austria because of his accusations against the former Federal Chancellor, B. Kreisky. In two articles he had used certain expressions as 'basest opportunism', 'immoral' and 'undignified' apropos of Mr Kreisky because of his contacts with ex-nazi politicians. But, on the other hand, according to the European Court, these impugned expressions had to be seen against the background of a post-election political controversy in which harsh criticism is in no way unusual but rather part of the hard-fought tussles of politics. So the Court was of the opinion that the interference in the journalist's exercise of the freedom of communication was a breach of Article 10 (*Lingens*, 1986, see also Voorhoof, 1986).

In an analogous way in the Oberschlick case critical and offensive speech was protected by Article 10 ECHR. In a press article M. Oberschlick expressed the opinion that some political proposals of M. Grabher-Meyer, a politician of the Austrian liberal party, were corresponding to the philosophy and the goals of the nazi-organisation NSDAP. For this, Oberschlick was condemned because of defamation, on the complaint by M. Grabher-Meyer. The European Court however took notice of the fact that the text published by Oberschlick contributed to a public debate on a political question of general interest. Taking into consideration also some other factors of the case, the Court came to the conclusion that the conviction of Oberschlick was not necessary in a democratic society for the protection of the rights of others (*Oberschlick*, 1991).

In the Castells case, the applicant was a lawyer and a senator of the Herri Batasuna party, a political movement supporting autonomy for the Basques. In a press article, Castells expressed the opinion that the government was responsible for the killing of people by some fascist groups. For this, Castells was sentenced for injury (libel) against the government. In its judgment of 23 April 1992 the European Court of Human Rights took the standpoint that the impugned article was dealing with a matter of an important interest for the public opinion of the region. The Court also took into account that the article was published by the press and was written by a member of parliament. The Court noticed: 'Précieuse pour chacun, la liberté d'expression l'est tout particulièrement pour un élu du peuple; il répresente ses électeurs, signale leurs préoccupations et défend leurs intérêts. Partant, des ingérences dans la liberté d'expression d'un parlementaire de l'opposition, tel que le requérant, commandent à la Cour de se livrer à un contrôle des plus stricts'. With regard to the fact that the allegations were directed against the government the Court was of the opinion that 'les limites de la critique admissible sont plus larges à l'égard du gouvernement que d'un simple particulier, ou même d'un homme politique. Dans un système démocratique, ses actions ou omissions doivent se trouver placées sous le contrôle attentif non seulement des pouvoirs lègislatif et judicaire, mais aussi de la presse et de l'opinion publique'. Last but not least the Court took notice of the fact that Castells was not given the opportunity to prove the truth of his allegations before the Spanish courts. The conviction of the applicant on these grounds was considered by the Court as an interference in the freedom of expression that was not necessary in a democratic society (*Castells*, 1992).

The *Thorgeirson* case concerned two articles published by Thorgeir Thorgeirson, a Reykyavik writer. In the articles, the first one published as an open letter to the Minister of Justice, Thorgeirson accused the local police of misconduct and abuse of power. Before the Icelandic courts, Thorgeirson was convicted for defamation of civil servants. The following passages were considered to be defamatory (*inter alia*): 'wild beasts in uniform', 'police brutes', 'brutes and sadists to act out their perversions' and the statement that some of the reported behaviour of the police 'was so typical of what is gradually becoming the public image of our police force defending itself: bullying, forgery, unlawful actions, superstitions, rashness and ineptitude'. The European Court of Human Rights however considered this interference in the freedom of expression not necessary in a democratic society. The Court was of the opinion that 'the articles bore, as was not in fact disputed, on a matter of serious public concern. It is true that both articles were framed in particularly strong terms. However, having regard to their purpose and the impact they were designed to have, the Court is of the opinion that the language used cannot be regarded as excessive'. In this case the Court observed that the criticisms published by Thorgeirson could not be taken as an attack against all members, or any specific member of the Reykyavik police force, but that the principal purpose of the litigious articles was to urge the Minister of Justice to set up an independant and impartial body to investigate complaints of police brutality. The conviction and sentence against Thorgeirson were capable of discouraging open discussion of matters of public concern (*Thorgeirson*, 1992).

In recent years, the European Court of Human Rights twice accepted national restrictions on the freedom of expression and information in order to protect the reputation or the rights of others, as in conformity with Article 10 ECHR. In both cases the Court took another standpoint than the European Commission in its report.

In the *Barfod* case a sanction as a result of a critical article which infringed the reputation of others and, indirectly, the maintenance of the authority of the judiciary, was in the Court's view not to be seen as a breach of Article 10 ECHR (*Barfod*, 1989, see also Voorhoof, 1989a 1989b). The litigious article containing a defamatory accusation against two lay judges, was seen as a sufficient basis for a sanction against the author of the article. The Court could not agree that the accusations against the two lay judges were to be situated as part of a political debate on the introduction of new taxes in Greenland/Denmark. According to the Court it did not concern 'a criticism of the reasoning in the judgment (. .) but rather (. .) a defamatory accusation against the lay judges personally, which was likely to lower them in public esteem' (*Barfod*, 1989). So, the political context in which the case was fought was not regarded by the Court as relevant for the question of proportionality. Furthermore, the Court was of the opinion that the applicant's conviction could not be considered to have the result of effectively limiting his right of freedom of expression. 'It was quite possible', according to the Court 'to question the composition of the High Court without at the same time attacking the two lay judges personally' (*Barfod*, 1989). According to the Court the applicant was in the possibility to participate in free public debate on the question of the structural impartiality of the High Court. The defamatory accusations against the judges personally were illegitimate and could not find protection under the umbrella of Article 10 ECHR.

The *Markt Intern* case concerned an article published in the business bulletin 'Markt Intern'. In the article some critical information was published on the business practices of a mail-order firm, 'The Club'. The article was published by the editor-in-chief, M. Klaus Beermann. The German Federal Court of Justice (Bundesgerichtshof) was of the opinion that the publication by Markt Intern was contrary to honest commercial practices and ordered Markt Intern to refrain from publishing in their information bulletin the statements published in the former article. The European Court of Human Rights, in a 9 to 9 voting, was of the opinion that it should not substitute its own evaluation of the facts for that of the national courts in the instant case, were those courts, on reasonable grounds, had considered the restrictions to be necessary (Markt Intern, 1989). Attention should be drawn to the fact that the Court left a larger margin of appreciation for the national courts and only recognised a lower degree of protection of the freedom of expression, because of the commercial context the Markt Intern article was situated in.

3.6. Attention must also be put on the importance of the truth or factual elements defamatory allegations are based on.

In the Court's view, a careful distinction needs to be made between facts and value judgments. The existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible to proof, which gives these opinions and value judgments an even larger scope of protection within the framework of Article 10.

In the *Lingens* case, the Court noted that the facts on which Lingens founded his value judgment were undisputed, as was also his good faith. According to the relevant Austrian criminal code, the journalist in such a case cannot escape conviction unless he can prove the truth of his statements. As regards value judgments this requirement is impossible of fulfilment and it infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10 ECHR (*Lingens*, 1986; *Oberschlick*, 1992).

In the Thorgeirson case the Court was of the opinion that the statements in the applicant's articles had an objective and factual basis. It was undisputed that some of the reported incidents did occur, while other factual elements consisted essentially of references to stories or rumours. This stories were known by most people and were so similar and numerous that they could hardly be treated as mere lies. In short, the applicant was held to be essentially reporting what was being said by others about police brutality (*Thorgeirson*, 1992). Defamatory allegations that are based on reliable information do not always have to be proven to be truth. The defamatory allegations in the *Thorgeirson* case, namely that unspecified members of the Reykyavik police had committed a number of acts of serious assault as well as forgery and other criminal offences, had not to be proven before the national courts according to the European Court: 'Insofar as the applicant was required to establish the truth of his statements, he was, in the Court's opinion, faced with an unreasonable, if not impossible task' (*Thorgeirson*, 1992).

In the *Castells* case the European Court could not agree with the fact that Castells was not given the opportunity to prove the truth of his allegations before the Spanish courts. The Court was of the opinion that Castells should have been given the possibility to prove the allegations against the government: 'Or une tentative de preuve se concevait fort bien pour nombre de ces affirmations, tout comme M. Castells pouvait raisonablement essayer d'établir sa bonne foi. Nul ne sait à quel résultat le Tribunal suprême eût abouti s'il avait acceuilli les offres du requérant, mais la Cour attache un poids décisif à la circonstance qul'il les déclara irrecevables'. So the exclusion of the possibility to prove the truth ('*exceptio veritatis*') and the conviction of the applicant

based, i.e. on the lack of truth for the defamatory allegations he published, makes that the conviction cannot be held to be necessary in a democratic society (*Castells*, 1992).

The other side of the coin is that the European Court of Human Rights is also taking it into consideration if there is no factual basis for defamatory allegations. In the *Barfod* case the Court noticed that the defamatory accusation against the judges 'was put forward without any supporting evidence'. The Court was of the opinion that 'no evidence has been submitted to the effect that the applicant was justified in believing that the two elements of criticism raised by him were so closely connected as to make the statement relating to the two judges legitimate' (*Barfod*, 1989). So because there was no proof of the accusations against the lay judges, the guarantee offered by Article 10 ECHR could not be considered as to protect the applicant's freedom of expression in this case.

In the *Markt Intern* case the judgment of the European Court refers to the findings of the German Federal Court that based its judgment on the premature nature of the disputed publication and the lack of sufficient grounds for publicising in the information bulletin an isolated incident. The European Court of Human Rights considered that 'even the publication of items which are true and describe real events may under certain circumstances be prohibited: the obligation to respect the privacy of others or the duty to respect the confidentiality of certain commercial information are examples. In addition, a correct statement can be and often is qualified in additional remarks, by value judgments, by suppositions or even insinuations. It must also be recognised that an isolated description of one such incident can give the false impression that the incident is evidence of a general practice' (*Markt Intern*, 1989). According to the *Markt Intern* judgment, it is primarily for the national courts to decide which statements are permissible and which are not, when these statements are made in a commercial context.

3.7. Finally, it has to be emphasised that in several cases the European Court of Human Rights came to the conclusion that a national conviction because of defamation or libel was infringing Article 10 ECHR, although the impugned publication contained a negative or strong wording. In the *Lingens* case the Court was of the opinion that the content and tone of the articles were on the whole fairly balanced but the use of the very strong wording of the value-judgments a propos of M. Kriesky in particular appeared likely to harm his reputation. According to the Court these expressions used by Lingens had to be seen against the background of a post-election political controversy, a struggle in which each used the weapons of his disposal. The Court was of the opinion that the strong criticism expressed by Lingens was in no way unusual in the context of this political debate (*Lingens*, 1986).

According to the Court's case law, the aim and the context in which the strong wording or harsh criticism is situated, has to be taken into account. In the *Thorgeirson* case the Court recognised that 'both articles were framed in particularly strong terms'. However, having regard to their purpose and the impact they were designed to have, the Court was of the opinion that the language used could not be regarded as excessive (Thorgeirson, 1992; see also Oberschlick, 1991 and Castells, 1992). The Court shows a higher degree of tolerance towards the impugned expressions when the strong wording is aimed at politician or the Government or public authorities. The negative allegations against a business group (*Markt Intern*, 1989) or the accusations against lay judges (*Barfod*, 1989) could not count on a high degree of protection within the framework of Article 10 ECHR.

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